BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996	)	**CC Docket No. 96-187**
	)	
	)	
	)	

OPPOSITION OF SOUTHWESTERN BELL TELEPHONE COMPANY, PACIFIC BELL AND NEVADA BELL TO PETITIONS FOR RECONSIDERATION

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SUMMARY*

SWBT, Pacific Bell, and Nevada Bell oppose the Petitions for Reconsideration of the Report and Order filed by MCI and AT&T. None of the points raised by these petitions should be granted. Instead, the Commission should grant the petition filed by SWBT.

The Commission's interpretation of "deemed lawful" should not be changed as requested by MCI and AT&T. While SWBT has requested in its own petition that Section 208 complaints should not be allowed against tariff revisions made under the streamlining rules, the Commission's interpretation of "deemed lawful" as a conclusive presumption of the lawfulness of a tariff filing is otherwise justified by the relevant judicial precedent, market forces, and the availability of pre-effective review.

MCI's request to make it more difficult to keep cost support confidential should be flatly rejected in light of the increasing competition in LEC markets. AT&T's request to make it more difficult for ILECs to lower their rates in a streamlined filing should also be denied.

AT&T has also suggested that the streamlining rules be changed to make annual filings more difficult for rate-of-return LECs and to make any mid-term PCI change more complicated. This request should be denied for the same reasons it is incorrect to make the annual filing more complex for price cap LECs. Finally, MCI's suggestion to limit the application of streamlining rules in a way not supported by the 1996 Act is groundless.

* All abbreviations used herein are referenced within the text.

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OPPOSITION OF SOUTHWESTERN BELL TELEPHONE COMPANY, PACIFIC BELL AND NEVADA BELL TO PETITIONS FOR RECONSIDERATION

Pursuant to Section 1.429(f) of the rules of the Federal Communications Commission (Commission),[2] This opposition hereby responds to the Petitions for Reconsideration (PFRs) of the Commission's Report and Order[3] filed by MCI Telecommunications Corporation (MCI) and AT&T Corp. (AT&T) in this docket on March 10, 1997, and placed on Public Notice by the Commission on March 21, 1997. This Opposition is filed on behalf of Southwestern Bell Telephone Company (SWBT) and on behalf of Pacific Bell and Nevada Bell, including the recently merged entity formerly known as Pacific Telesis and its subsidiaries. None of the points raised by either MCI or AT&T are valid and none of their requests should be granted; however, some of the arguments used by these parties support the points made by SWBT in its Petition for Reconsideration filed in this docket on March 10, 1997.

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[2] 47 C.F.R. Section 1.429(f).

[3] FCC 97-23 (released January 31, 1997).

I. THE COMMISSION CORRECTLY INTERPRETED "DEEMED LAWFUL" TO MEAN THAT A STREAMLINED TARIFF THAT TAKES EFFECT WITHOUT PRIOR SUSPENSION OR INVESTIGATION IS CONCLUSIVELY PRESUMED TO BE REASONABLE AND LAWFUL.

A. Neither MCI's nor AT&T's Interpretation of "Deemed Lawful" Should be Adopted.

MCI claims that the Telecommunications Act of 1996 (1996 Act), through Section 204(a)(3), "simply streamlines the procedures governing LEC [local exchange carrier] tariff filings and establishes a rebuttable presumption having no effect on a LEC's liability for damages."[4] MCI argues that the word "deemed" has a variety of meanings under the law and the Commission should not feel compelled to establish more than a form of rebuttable presumption to carry out the intent of the 1996 Act.

MCI asserts, in particular, that Section 208 and the complaint procedures are not to be affected by the changes in 204(a)(3) since Section 208 was not specifically changed. MCI argues that foreclosing retroactive damages should make a Commission decision not to suspend a tariff filing immediately appealable.

While the Commission's treatment of complaints against streamlined tariff filings is inconsistent with the Congressional intent, the Commission correctly found that the statute creates a "conclusive presumption of lawfulness," not merely a "rebuttable" one. We might agree with MCI that "deemed lawful" is susceptible to a range of interpretations, but would not agree with MCI that all of those interpretations only establish "rebuttable, limited presumptions." MCI does not

[4] MCI at p. 2.

undertake to distinguish the cases cited by the Report and Order in which the word "deemed" denotes a conclusive presumption.[5]

Further, as SWBT has noted in its Petition for Reconsideration, the term "deemed lawful" insofar as it establishes a conclusive presumption, cannot be overturned in the context of a 208 proceeding, since in a 208 proceeding the complainant carries the burden of proof, and, thus, cannot defeat such a presumption. Only in the context of a Section 205 investigation could the general law be changed such that a tariff would need to be modified. MCI's petition actually concurs with such a full interpretation of a "conclusive presumption."[6]

MCI also claims that the Commission's interpretation of the statute is "absurd"[7] since it would afford greater protection to incumbent local exchange carrier (ILEC) tariffs than to competitive local exchange carrier (CLEC) tariffs. MCI, however, fails to appropriately explain away the option allowed to CLECs: they too, may file tariffs under the streamlining provisions.[8] While MCI claims that a CLEC would have to give up the "benefits of . . . forbearance in order to take advantage of the damages immunity," this point only underscores arguments previously made by SWBT that it is unreasonable to deny ILECs the benefits currently provided to CLECs.

Under the current rules, non-ILECs may file tariffs on one-day's notice without any cost support. This short notice period makes it impossible to perform the review necessary to make a "deemed lawful" determination in markets not fully "open" because of uneven rules for competitors.

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[5] Report and Order at para. 19.

[6] MCI at p. 5.

[7] MCI at p. 14.

[8] Report and Order at para. 40.

However, this problem could be rectified if the Commission would exercise its authority and allow all carriers, including ILECs, to file on one-day notice without cost support. By making this change, markets would be more truly open and one-day filings could be "deemed lawful," by virtue of full and fair competition that would make unlawful rates unsustainable. Since ILECs do not currently have the ability to make one day filings without cost support, CLECs are still in a better position than ILECs since they have a choice. MCI should not complain that the many choices allowed CLECs are less attractive than the few choices allowed ILECs.

AT&T's Petition also takes issue with the Commission's interpretation of "deemed lawful." While AT&T attempts to distinguish the Ohio Power and Municipal Resale cases, AT&T itself admits that the pricing regulations discussed in those cases were designed "to avoid duplicative regulatory proceedings."[9] Duplicative proceedings, however, are exactly what is to be avoided by a full implementation of the Commission's decision to use a "conclusive presumption" in this matter. If, in fact, the Commission fully implements its intent to use a conclusive presumption by not allowing retroactive or prospective damages in 208 proceedings over tariffed rates, "duplicative regulatory proceedings" (the initial consideration of a LEC's tariff filing and a duplicative complaint process) would be avoided.

AT&T also asserts that customers should only be prohibited from seeking reparations for past overcharges when the Commission makes "an affirmative finding that a rate is reasonable." [10] That situation is in fact what the statute calls for the Commission to do. The initial considerations over whether a tariff should be allowed to take effect now become the "affirmative finding"

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[9] AT&T at p. 4.

[10] AT&T at p. 8.

requested by AT&T, and thus, customers should no longer have a "second bite at the apple" to challenge an LEC's rates.

Both MCI and AT&T claim that it is inappropriate to allow these flexibilities to ILECs given the current state of competition, which they denigrate by characterizing ILECs as "monopolies"[11] or by stating that the level of competition is merely in "a state of flux."[12] The explanation for the Commission's decision, however, is that all markets that are covered by the streamlining provisions are no longer "monopolies" or merely "in a state of flux." Instead, the changes in the 1996 Act have now ensured that all markets are competitive, and ILECs must be given the opportunity to file tariffs on a streamlined basis in those competitive markets. This result is neither "unjust" nor "absurd."

B. The Commission Correctly Interpreted "Deemed Lawful" To Mean that a Streamlined Tariff that Takes Effect Without Prior Suspension or Investigation is Conclusively Presumed to be Reasonable and Lawful.

The Commission correctly concluded that Congress, in amending Section 204(a)(3)[13] of the Communications Act, unmistakably intended to reform tariff filing proceedings. By streamlining the tariff filing period, Congress intended to eliminate unnecessary delays in the tariff review and approval process while leaving in place adequate safeguards to protect consumers. Further, by using the term "deemed lawful" in Section 204(a)(3), Congress intended that the effective rate be both the legal and lawful rate. The language of Section 204(a)(3) is not ambiguous. LEC tariff filings which go into effect without suspension or investigation are lawful. If Congress had wanted to create only

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[11] AT&T at p. 9.

[12] MCI at p. 13.

[13] 47 U.S.C. § 204(a)(3)(1996).

a rebuttable presumption of lawfulness, it would have expressly done so. It did not, thus LEC tariff filings which go into effect without challenge by the Commission must be treated as lawful rates.

As opposed to the view of MCI and AT&T, the Commission's interpretation of "deemed lawful" as establishing lawful rates more properly furthers Congress' pro-competitive, deregulatory goals." Unlike the second interpretation of "deemed lawful" proposed by the Commission in the NPRM, the adopted interpretation establishes more certainty in rates, thereby alleviating LECs' fears of retroactive punishment and consumers' skepticism of being charged unreasonable rates. Such certainty in rates surely will foster competition and encourage the introduction of new and innovative services--goals Congress clearly had in mind when it enacted the 1996 Telecommunications Act.

Petitioners argue that the Commission's interpretation eviscerates decades of long-standing federal court jurisprudence as well as over a century of administrative law regarding remedies available for unreasonable common carrier rates.[14] We disagree. With the changes suggested in SWBT's PFR, the Commission's interpretation of "deemed lawful" is well-within the ambit of Supreme Court and appellate jurisprudence.

In Arizona Grocery,[15] the Supreme Court determined that filed tariff rates established only the legal rate, not the lawful rate, because the reasonableness of the rates had not been determined by the Interstate Commerce Commission.[16] The streamlined process enacted by Congress in Section 204(a)(3), however, determines that LEC tariff filings which become lawful, effective rates are in

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[14] MCI at 7; AT&T at 7-8.

[15] Arizona Grocery Co. v. Atchison, T& S.F. Ry., 284 U.S. 370 (1932).

[16] Id. At 388-89.

fact reasonable. As the Commission correctly held, Section 204(a)(3) mandates that it review tariff filings prior to their effective date.[17] Such review necessarily will entail analyzing rate regulation policies and comments and reply comments filed in opposition to and support of the proposed tariffs. The Commission correctly concluded that where it decides not to suspend or investigate a tariff filing during the pre-effective period, the tariff is conclusively presumed to be reasonable, and therefore lawful.[18] Thus contrary to AT&T's claims,[19] the Commission's interpretation does not eradicate decades of Supreme Court jurisprudence because in reviewing a tariff filing the Commission must make a determination regarding its reasonableness.

In addition, the Commission correctly concluded that where a statute uses the term "deemed" in the context of pricing or rate regulation, it establishes a conclusive presumption. Indeed the Commission supplied ample appellate authority supporting its determination that Congress' use of the term "deemed lawful" in Section 204(a)(3) creates a conclusive presumption of reasonableness for rates which take effect without suspension.[20] Petitioners have countered with examples of appellate cases wherein the term "deemed" was interpreted to create only a rebuttable presumption;[21]

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[17] Report and Order at 26.

[18] See, Report and Order at 10.

[19] AT&T at 7-8.

[20] Report and Order at 10.

[21] See AT&T at 6-7 n. 16.

however, none of their cited cases pertained to rate regulation. Municipal Resale,[22] Ohio Power[23] and other cases cited by the the Commission, on the other hand, specifically address the reasonableness of rates. Thus, the Commission was not only correct in selecting its first interpretation of "deemed lawful," but, in light of Congress' intent and relevant jurisprudence, was compelled to reach this conclusion.

C. Pre-effective Review and Market Forces Will Protect Consumers.

MCI and other petitioners seemingly have ignored the Commission's express acknowledgment that it is required under 204(a)(3) to conduct a pre-effective review of LEC tariff filings. Such a process necessarily entails review of the proposed tariff in conjunction with established Commission policies regarding rate regulation. In addition, the Commission has adopted procedures allowing consumers, carriers and other interested parties to fully participate in the pre-effective review process.[24] As such, the Commission will receive varied perspectives regarding the reasonableness of LEC tariff filings. Unreasonable LEC filings may be suspended and investigated by the Commission. Further, suspended tariff filings will only establish the legal, not lawful, rate upon effect. Consequently, the pre-effective review process will ensure that only reasonable rates become lawful rates.

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[22] Municipal Resale Service Customers v. FERC, 43 F.3d 1046, 1050 (6th Cir. 1995) (citing Ohio Power for the proposition that FERC was obligated to find Ohio Power Company's rates reasonable because the SEC had already deemed the rates reasonable).

[23] Ohio Power Co. v. FERC, 954 F.2d 779, 782 (D.C. Cir. 1992) (stating that the term "deemed" creates a conclusive presumption).

[24] Report and Order at 35-36.

Moreover, the marketplace will ensure that rates are reasonable. LECs no longer have a monopoly on telecommunications services. There are already numerous competitors in the market, and the number of new entrants is increasing. Consumers now have many choices. In this competitive environment, the marketplace, not regulation will establish prices. Congress' inclusion of "deemed lawful" in Section 204(a)(3) recognizes reliance on market forces, rather than regulation, to set prices. Thus, petitioners' stated concerns are unfounded. Market forces, together with pre-effective processes will protect consumers by ensuring reasonable rates.

II. MCI's PROPOSED CHANGES FOR CONFIDENTIAL FILINGS SHOULD BE REJECTED.

MCI claims that an LEC should not be permitted to file cost support under confidential cover until it has met the Section 271(d)(3) requirements.[25] MCI's unrealistic assessment of confidentiality standards should be rejected. MCI essentially claims that there is "little risk of competitive harm"[26] until an LEC meets the Section 271(d)(3) standards. MCI, however, ignores the many instances in the past where LEC filings have been appropriately held to be subject to competition, and thus protected from public disclosure.[27] It would reverse all such precedent for the Commission to now impose a 271(d)(3) standard on LEC confidential filings. Such a drastic change in this standard cannot be allowed at this point in the rulemaking proceedings, as it is beyond the scope of the Commission's Notice.

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[25] MCI at p. 17.

[26] MCI at p. 18.

[27] See, e.g., Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal No. 2607, Order (DA 97-427) (Com. Car. Bur. released February 28, 1997).

While competition may certainly vary in intensity from service to service, MCI cannot deny that competition has clearly been shown for special access services, dedicated transport to end offices and tandem offices, directory assistance, operator services and interexchange services.[28]

III. AT&T's RECOMMENDATION TO LENGTHEN THE REVIEW PROCESS SHOULD BE DISMISSED.

The Report and Order sets forth a reasonable timetable for LEC tariff transmittals filed on 7 days' notice (i.e., rate decreases). Petitions against such transmittals must be filed within three calendar days from the tariff filing. Replies must be filed within two calendar days from service of the petition. The Commission then has two more calendar days to evaluate the filings before this takes effect. AT&T objects to this schedule on the ground that petitioners should be given at least two business days to prepare their petitions.[29] However, AT&T neglects to deal with the consequences of such a rule. One consequence could be to delay the effective dates of the filing in order to retain the LECs' two days to reply and the Commission's two days to review. This would plainly be contrary to the statute, which states a rate decrease "shall be effective 7 days . . . after the date on which it is filed."[30] Alternatively, either the LECs' time to file a reply would have to be cut to one, or even zero, days, or the Commission's time to review the filings would have to be cut or eliminated. Both of these alternatives would provide unreasonable time for the LECs and/or the Commission to respond or review the record.

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[28] See attached materials: Attachment 1 is Exhibit A to SWBT's recently filed Transmittal No. 2622 and Appendix 4 to SWBT's Comments in CC Docket No. 96-262.

[29] AT&T at 10-11.

[30] 47 U.S.C. § 204(a)(3).

AT&T claims that under the rules just promulgated, LEC tariffs can be filed on a Friday and commentors will be allotted only one business day to respond. AT&T, however, does not explain why it alone cannot work over the weekend in such cases to make its filing on Monday. Further, AT&T conveniently neglects to mention that these abbreviated procedures are only allowed for strict rate decreases filed by LECs. The Commission clearly allowed such abbreviated procedures only to be used in such cases since there is little need for customers to be concerned about a rate decrease because rate decreases confer immediate benefits on customers.

IV. AT&T's REQUESTS TO FURTHER DILUTE THE MEANING OF 402(b)(1)(A) SHOULD BE REJECTED.

AT&T claims that rate-of-return LECs must also be required to file Tariff Review Plan (TRP) information 90 days prior to their annual access filings, and that price cap LECs should provide advance cost support for any mid-term price cap index (PCI) change.[31] AT&T's requests should be rejected. For the reasons stated in SWBT's PFR, any requirement to signal the contents of a tariff filing before it is made unlawfully dilutes the intent of Section 402(b)(1)(A). The Commission should not compound the error in the portion of its Report and Order that addresses TRP requirements (Section III(D)(5)) by extending it to rate-of-return LECs or to other mid-term tariff filings of price cap LECs.

[31]AT&T at 12-13.

V. SECTION 204(a)(3) APPLIES TO ALL LEC SERVICES.

MCI asks the Commission to "clarify" that the streamlined tariff filing procedures of Section 204(a)(3) apply only to exchange access services. Such a so-called clarification is not justified by the clear and unambiguous language of the statute. Tariff streamlining is available to "a local exchange carrier" filing any "new or revised charge, classification, regulation, or practice on a streamlined basis" without regard to which federally tariffed services that local exchange carrier may be providing.

VI. CONCLUSION

For the foregoing reasons, we respectfully request that the Petitions for Reconsideration of MCI and AT&T be dismissed.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

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April 10, 1997

SOUTHWESTERN BELL
HICAP TRACK
THIRD QUARTER, 1996

November 15, 1996

QUALITY STRATEGIES.
WASHINGTON, D.C.

SUMMARY CONCLUSIONS

Southwestern Bell Telephone (SWBT) is subject to varying levels of competition from CAPs in the metropolitan areas analyzed. SWBT has suffered significant losses in Dallas and Houston, retaining approximately 57% and 62% share in these markets, respectively. SWBT has moderate losses in the St. Louis and Kansas City markets; SWBT retains approximately 85% and 93% share, respectively in these markets.

- **SWBT faces significant competition from MFS and TCG in the Dallas and Houston markets.**

  MFS is SWBT's most significant competitor in both of these markets, having gained approximately 26% and 23% overall HICAP share in Dallas and Houston, respectively. TCG has the second largest overall HICAP share with approximately 15% share in Dallas and approximately 12% share in Houston. Time Warner has an extensive network in Houston; however Time Warner only has approximately 2% overall HICAP market share. MCImetro recently began offering service in Dallas and Houston and has approximately 2% share in each of the markets.

- **MFS and TCG also are competing with SWBT in St. Louis.**

  MFS' and TCG's networks are not as mature in St. Louis as in Dallas and Houston, but both companies are aggressively marketing HICAP services in order to gain market share. TCG is the most significant competitor in St. Louis, with approximately 9% market share; MFS has approximately 6% market share in St. Louis.

- **SWBT encounters competition from Time Warner (Kansas City Fibernet) and Brooks Fiber in Kansas City.**

  Kansas City Fibernet is the most significant competitor with approximately 5% overall HICAP share in Kansas City. Brooks Fiber recently began offering service and has gained approximately 1% of the overall HICAP market in Kansas City.

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- **SWBT's losses are generally greatest in the financial services and healthcare markets.**

  In all markets SWBT has lost the most share in the financial/professional service and healthcare market segments. Financial service/professional firms and healthcare companies are commonly located in the downtown areas where CAPs originally build there networks.

  In Dallas, competitors are focusing on the financial/professional service segment; SWBT has retained only approximately 46% share of this segment. MFS is a strong competitor in the financial/professional service segment, having gained approximately 37% share.

  In Houston, SWBT's largest losses are in the healthcare segment. SWBT has lost approximately 52% share in this segment. Again, MFS is SWBT's leading competitor, with approximately 34% of the market.

  The healthcare segment also represents the greatest loss in the St. Louis market. SWBT has approximately 77% of this market. TCG represents SWBT's most significant competitor with approximately 15% of the market.

  In Kansas City, SWBT has lost equal share in the financial/professional and healthcare segments. SWBT has approximately 91% share in these segments. Kansas City Fibernet is the primary competitor with 7% share in both segments.

- **As CAPs expand their networks and begin offering switched services, SWBT's market share will continue to decline.**

  Most CAPs in SWBT's region are currently expanding their networks, and many are installing switches in anticipation of offering local switched services. As CAPs reach more customers and sign building agreements with additional buildings, CAPs will take customers away from SWBT.

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SUMMARY RESULTS
OVERALL HICAP SHARE

	4Q94	3Q96
Dallas		
Southwestern Bell	62.9%	57.2%
Competitors	37.1%	42.8%
Total	100.0%	100.0%
Houston		
Southwestern Bell	69.5%	61.8%
Competitors	30.5%	38.2%
Total	100.0%	100.0%
St. Louis		
Southwestern Bell		84.7%
Competitors		15.3%
Total		100.0%
Kansas City		
Southwestern Bell		93.1%
Competitors		6.9%
Total		100.0%

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DALLAS

MFS DALLAS

NETWORK OVERVIEW

MFS operates a 170 route mile network in the Dallas metropolitan area. The MFS Dallas network has SONET architecture and operates at OC-48 speed. The MFS Dallas network provides service to the following Dallas communities:

- Downtown Dallas
- Irving
- Plano
- Richardson
- Farmers Branch

MFS began offering local dial tone services during the fourth quarter of 1996 via an Ericsson AXE central office switch. The MFS Dallas network currently connects 90 buildings in metropolitan Dallas.

MFS also operates a small Metropolitan Area Exchange (MAE) in Dallas. The MAE, sometime referred to as an Internet Service Provider (ISP) hub, allows the company to offer Internet access.

EXPANSION PLANS

MFS indicates that it will add approximately ten buildings to its downtown Dallas network by second quarter, 1996. MFS plans to offer both HICAP and switched services to these additional downtown Dallas businesses.

PRODUCTS AND SERVICES OFFERED

MFS Dallas offers a full array of dedicated and switched products, including the following:

- DS-0
- DS-1
- DS-3
- OC-n (up to OC-48)
- E1
- Basic business lines
- Centrex
- PBX
- Long distance
- IntraLATA toll
- Calling card
- Voice mail
- Directory assistance
- Operator assistance
- Frame relay
- ATM

See the MFS Dallas network map on page 23. See the MFS building list on page 24.

TCG DALLAS

NETWORK OVERVIEW

Teleport Communications Group operates a 400 route mile fiber network in metropolitan Dallas. The TCG Dallas network backbone is comprised of 100% fiber optic cable constructed in a SONET architecture. The TCG Dallas network provides service to the following areas of Dallas:

- Downtown Dallas
- Addison
- Farmers Branch
- Galleria
- Carrollton
- Plano
- Stemmons Corridor
- Fort Worth

TCG has gained certification from the Texas Public Service Commission to offer local switched services. TCG Dallas provides local switched services via an AT&T 5ESS central office switch.

EXPANSION PLANS

TCG started constructing an additional SONET loop in downtown Fort-Worth. TCG anticipates completing the loop by the second quarter, 1997. TCG indicates that the Fort-Worth loop will add approximately 15 on-net buildings in downtown Fort Worth.

TCG indicates that it will continue add additional on-net buildings in downtown Dallas. TCG will add approximately five buildings per month in downtown Dallas over the next six months.

PRODUCTS AND SERVICES OFFERED

TCG Dallas offers a full array of dedicated and switched products, including the following:

- DS-0
- DS-1
- DS-3
- Omnilink OC-n (up to OC-48)
- E1
- Basic business lines
- Centrex
- PBX
- IntraLATA toll
- Calling card
- Voice mail
- Directory assistance
- Operator assistance
- Frame relay
- Internet (planned for 2Q97)
- ATM
- ISDN (planned for 2Q97)

See the TCG Dallas network map on page 27.

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